CASE NO. 10147

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CASH COLE,
Appellant,

vs.

WALLIS GEORGE,
Appellee.

APPELLEE'S BRIEF

ON APPEAL FROM THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA,
DIVISION NO. 1.

HOWARD D. STABLER,
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STATUTES REFERRED TO

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STATEMENT OF CASE

This action was commenced in the District Court for the Territory of Alaska, First Division, at Juneau, by the appellant Cash Cole (hereinafter called the plaintiff), a stockholder of the domestic corporation Baranof Hotel Incorporated, against the appellee

Wallis George (hereinafter called the defendant), the treasurer of said corporation, to recover from the defendant personally a statutory penalty of $50.00 per day for the period of 63 days, and amounting to $3,-150.00, on account of the alleged refusal and neglect of the defendant, for 63 days after written request by the plaintiff stockholder, to make and file the annual corporation report required by Section 923, Compiled Laws of Alaska for 1933, as amended by Chapter 89, page 183, Session Laws of Alaska for 1935 (correctly quoted on page 2 of Appellant's Brief).

The defendant demurred (Trans. p. 7) to the plaintiff's amended complaint on the statutory grounds (C.L.A. 3416, 4 and 6):

> 1. That there is a defect in non-joinder of necessary parties defandant; and
>
> 2. That the complaint does not state facts sufficient to constitute a cause of action against the defendant Wallis George.

The defendant's demurrer to the plaintiff's amended complaint was sustained (Trans. p. 7) by the District Court; and the Court in its written opinion (Trans. p. 8) gave its reasons for sustaining the demurrer. The plaintiff refused to plead further, and judgment dismissing the plaintiff's action was entered (Trans. p. 15). The plaintiff has appealed to this Court from the judgment of dismissal.

THE STATUTE INVOLVED

Section 923, Compiled Laws of Alaska for 1933 (correctly quoted at page 2, Appellant's Brief) was originally enacted by the Territorial Legislature at its 1931 Session as Section 23 of Chapter 8 (Session Laws of Alaska for 1931). It was incorporated in the Compiled Laws of Alaska for 1933 as Section 923. Section 923 was amended, to read as quoted, at the 1935 Session. As far as we know no court, other than the District Court for the First Division in its Opinion filed in this action (Trans. p. 8), has ever attempted to construe the involved wording of the statute in respect of the points now before the court. As far as we know the statute is the original idea of the Alaska Legislature. We have not been able to find a similar statute anywhere assessing such a heavy and arbitrary penalty against officers of a corporation personally in favor of creditors and stockholders; and without any showing required by such creditors or stockholders that they were in some way damaged or injured in consequence of failure to file the report. Such is the statute on which the plaintiff relies for recovery of the penalty.

STATEMENT OF FACTS

The plaintiff's amended complaint (Trans. p. 2) sets up that the Baranof Hotel Incorporated is a domestic corporation of Alaska; that Section 923 requires domestic corporations to file an annual report in specified Territorial offices; that the corporation failed to

file the report; that,

> "On the 17th day of November, 1941, this plaintiff, as a stockholder, made a written request of the defendant Wallis George, treasurer of said corporation, that such duty be performed, to wit, file said annual report, as required by law, of the said Baranof Hotel Corporation; that said defendant Wallis George, as hereinbefore alleged, failed, refused and neglected to make or cause to be made said annual report and file the same with the Auditor of the Territory of Alaska and the clerk of the District Court for the First Division; that at the date of the filing of the first complaint on behalf of the plaintiff sixty-three (63) days had expired since plaintiff Cash Cole made said written request herein above referred to, to wit, from the 17th day of November, 1941, to January 19th, 1942; that by reason of the premises the defendant forfeited and became indebted to the plaintiff in the sum of $3,150.00, whereby an action accrued to this plaintiff in accordance with Section 923 of the Session Laws of Alaska of 1935."

The defendant contends in support of his demurrer to the plaintiff's amended complaint:

> Point 1. That Section 923 makes it the duty of the president and treasurer of the corporation jointly, and not severally, to make, verify and file the annual report required by the statute; and as the plaintiff's amended complaint shows only a written request was made on the treasurer to make and file the report, and no request whatever made on the president, the amended complaint fails to state facts sufficient to constitute a cause of action.

Point 2. That the statute gives a right of action only to an "aggrieved" stockholder or creditor of the corporation; and the plaintiff's amended complaint fails to show that the plaintiff is such a stockholder or creditor.

Point 3. That the penalty exacted by the statute, when applied to the facts of the case before the court, as shown by the plaintiff's amended complaint, is arbitrary, unreasonable, excessive, discriminatory, and amounts to confiscation of the defendant's property without due process of law.

ARGUMENT

Statutes allowing a stockholder to recover a penalty from officers are penal in character. Such statutes are to be strictly construed, and liability exists only when the case is brought within the statute. 14A Corpus Juris 168; and 25 Corpus Juris 1197.

So construing the statute and plaintiff's amended complaint, the District Court's order sustaining the defendant's demurrer, and its judgment dismissing the plaintiff's action, should be affirmed for the following reasons:

POINT 1

The statute definitely places the duty on the corporation itself in the first instance of annually filing a report "made and verified by the president and treasurer" of the corporation. The words of the statute in this respect are:

> "Every corporation formed under this article shall annually . . . file with the Auditor . . . and with the Clerk of the District Court . . . a report MADE AND VERIFIED BY THE PRESIDENT AND TREASURER." (Capitalization ours).

Therefore, in the first instance, any officer of the corporation, or any person representing the corporation, such as its attorney as is generally the case, may file the report. As far the officers of the corporation are concerned, the only condition of the statute is that the report "shall be made and verified by the president and treasurer of the corporation."

The statute then prescribes that:

> "If any report be not made and filed AS PRESCRIBED IN THIS SECTION, either of such officers who shall thereafter refuse or neglect TO MAKE AND FILE SUCH REPORTS within ten days after a written request to do so shall have been made by a creditor or a stockholder of the corporation, shall be under penalty of $50.00 recoverable by such AGGRIEVED creditor or stockholder, for every day he or they shall so neglect or refuse." (Capitalization ours).

In order for a creditor or stockholder of the corporation to fix a personal liability for the penalty on the president or treasurer of the corporation for their refusal or neglect to MAKE AND FILE the report required by the statute all the conditions fixing the penalty and the personal liability for the penalty must be shown in the complaint, namely:

1. That the corporation itself failed to file with the Territorial Auditor and Clerk of the District Court "a report made and verified by the president and treasurer" of the corporation.

2. A written request made by a creditor or stockholder of the corporation upon BOTH the president and treasurer of the corporation to MAKE AND FILE the report required by the statute, namely, a report MADE AND VERIFIED by both the president and treasurer of the corporation.

3. Refusal or neglect of both, or either, the president and/or treasurer of the corporation "to make and file" the report required by the statute, within 10 days after such written request made on both; and

4. That the creditor or stockholder was "aggrieved" in some manner recognized by law.

The words of the statute which fix the penalty are: "refusal or neglect to make and file the report as prescribed in this section." The word "section" plainly means Section 923 of the Compiled Laws of Alaska. According to Section 923, the report which is to be made and filed must contain the information specified in the statute; and it must be "made and verified" by both the president and treasurer of the corporation. There is no several duty on the part of the treasurer to make and verify, or to make and file, the report. A report made and verified only by the treasurer is not the report prescribed in Section 923. Unless the report is made and verified by both the president and treas-

urer of the corporation it is a nullity; and does not operate to release the president or treasurer from the statutory liability. 14A Corpus Juris 213, Section 2019.

Nowhere in the statute is there any modification of the original statement of essential information which the report shall contain. Nor is there any modification whatever of the provision that the report shall be made and verified by both the president and treasurer of the corporation; nor any modification whatever of the joint duty of the president and treasurer to make and file the report. The only report that will satisfy the statute is a joint report containing the information specified by the statute, made and verified by both the president and treasurer of the corporation.

In this case, where demand was made only on the treasurer to make and file the report, the treasurer could not by himself make and file such a report as the statute requires. The treasurer could not compel the president to make and verify the report with him. The president of the corporation is not liable to the stockholder for the penalty, for no demand was made on the president by the stockholder. The stockholder could enforce by penalty the refusal or failure of the president to make and verify, or make and file, the report with the treasurer, but he has failed to take any step to do so.

It seems plain that the duty to make and file the

report is JOINT,—the duty of both the president and the treasurer, and not the several duty of the one or of the other; and that the duty to file the report within 10 days, and the liability for the penalty in case of failure to do so, are not set in motion by a written request on one to perform the duty. The demand for performance of the statutory duty must be made on all who are jointly obliged to perform it; and all must be joined in the action.

Where proper demand is made on both the president and treasurer, and "either of such officers thereafter refuse or neglect to make and file such reports" within 10 days, both of them are, or either of them is, liable for the penalty. The final words of the statute fixing a penalty of $50.00 "for every day HE OR THEY shall so neglect or refuse" indicate that after demand on both, if ONE refuses or neglects to participate with the other in making and filing the report which the statute requires both to make and verify, or if BOTH refuse or neglect to make and file the report, HE OR THEY become severally or jointly liable for the penalty, depending upon the circumstances of whether one or both neglect or refuse.

That such was apparently the intention of the Legislature is further evidenced by the fact that the statute as originally enacted in 1931 read:

"$50.00 recoverable by such aggrieved cred-

itor or stockholder for every day HE shall so neglect or refuse",

and now, since amendment by the 1935 Legislature, reads:

"$50.00 recoverable by such aggrieved creditor or stockholder for every day HE OR THEY shall so neglect or refuse."

Therefore, before both, or either, become liable for the penalty the joint duty, and the joint or several breach of that duty, must be established and pleaded. Certainly the statute should not be construed so as to penalize the treasurer of a corporation severally for neglecting to perform a duty which the statute specifically provides can only be performed by the treasurer and president jointly.

The action for the penalty is quasi contractu; and both the treasurer and president of the corporation should have been joined as defendants. The rule is laid down in Pomeroy's Code Remedies (Fifth Ed.) page 327, section 200, as follows:

"In an action against joint debtors, or to enforce a joint liability arising out of contract, all of the joint debtors or joint contractors that are living must be united as co-defendants; and a neglect to make such union of parties, if properly taken advantage of, will be fatal to the action . . . The codes, in the absence of such express provisions as are found in those of some States, have not changed the nature of a joint liability on con-

> tract, nor assimilated it to a several or joint and several one."

Sections 3392 and 3859 Compiled Laws of Alaska for 1933 provide:

> "Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants . . . "

The plaintiff's amended complaint alleges only a request made on the treasurer Wallis George to make and file the report; and alleges that it was the duty of the treasurer only to make the report. The complaint fails to make the president of the corporation a party defendant. For these reasons the defendant's demurrer should be sustained on both points; and the District Court's judgment dismissing the plaintiff's action should be affirmed.

POINT 2

The statute makes the president and treasurer of the corporation personally liable for the penalty only to an "aggrieved creditor or stockholder." The plaintiff's complaint wholly fails to show that the plaintiff was "aggrieved" in any manner; and therefore it does not state facts sufficient to constitute a cause of action.

The District Court took the narrow view of the statute that any creditor or stockholder was "aggrieved" if he was a creditor or stockholder and the

report was not filed within 10 days after written request was made as provided by the statute; and that it was not necessary for such creditor or stockholder to show that any damage or injury resulted to him from the failure to file the report.

However, if such was the intention of the Legislature, there was no reason for the Legislature to use the words "recoverable by such AGGRIEVED creditor or stockholder." Instead, the Legislature would have said only, "recoverable by such creditor or stockholder." And we think it incredible that the Legislature intended to make an officer of a corporation personally liable to a creditor or stockholder for a cumulative $50.00 per day penalty, which might amount to $3,-150.00 as is alleged in this case, without a showing by the creditor or stockholder that he suffered loss or injury in some manner,—that he was aggrieved.

In 2 Corpus Juris at page 973 the word "aggrieved" is defined as:

> "Having suffered loss or injury; damnified; injured. An aggrieved party or person is one who is injured in a legal sense, one who has suffered an injury to person or property."

In the case of *State v. Central Vermont Railroad*, 21 LRA NS 949, the words "aggrieved party" are defined as "one who is injured in a legal sense; one whose pecuniary interest is directly affected,—enlarged or diminished.

Even under the narrow construction placed upon the word "aggrieved", the plaintiff could not be an aggrieved stockholder if he failed to acquire a right to the penalty by reason of his failure to make a written request on both the president and treasurer of the corporation to make and file the annual report.

The plaintiff's amended complaint wholly fails to show that the plaintiff is an "aggrieved stockholder", and in consequence the amended complaint fails to state a cause of action against the defendant.

POINT 3

The penalty exacted by the statute, when applied to the facts of the case before the court, as shown by the plaintiff's complaint, is arbitrary, unreasonable, excessive, discriminatory, and amounts to confiscation of the defendant's property without due process of law.

In 25 Corpus Juris at page 1180, section 75 is the following statement of law:

> "The amount of a penalty to be inflicted rests in sound discretion of the legislature, and it is only when the minimum prescribed by statute is flagrantly oppressive and disproportionate to the offense for which it is imposed that the courts will interfere and refuse to enforce the enactment."

Such, we think is the law generally. But we do not limit our contention herein to the proposition that the Alaska statute imposing a penalty of $50.00 a day for failure to file a corporation's annual report is in

violation of due process in every case. A case might be found where penalties aggregating $3,150.00 would not be unreasonable when applied to the facts of that case,—as for instance where a stockholder bought or sold stock and incurred loss amounting to $3,150.00 which he would not have incurred had the report been filed. Our point is that the statute, when applied to the facts of this case (Cash Cole v. Wallis George) deprives the defendant Wallis George of his property in violation of the due process provision of the Constitution; and that the court should hold that the penalty prescribed, when applied to the facts pleaded, are so arbitrary, excessive and unreasonable as to deprive the defendant of his property without due process of law. That such is the case seems at once apparent, if the plaintiff is not required to show any damage or injury.

The plaintiff's amended complaint fails to show that the plaintiff was damaged or injured in any particular by reason of the failure of the officers of the corporation to file the annual report. The plaintiff does not show that he was aggrieved, and in the absence of such a showing it must be presumed that the defendant was not damaged or aggrieved in any pecuniary sense. Without some showing that plaintiff's damage or injury was in reasonable proportion to the penalties claimed, we think the amended complaint, on its face, shows the penalties claimed are so unreasonable, arbitrary and excessive as to deprive the defendant of his property without due process of law.

In the case of *Southwestern Tel. & Tel. v. Danaher*, 238 US 482, 35 Sup. Ct. 886, a statute of the State of Arkansas prescribed a penalty of $100 for each day a telephone company continued specified discriminations against a telephone subscriber. The action was to recover penalties at the rate of $100 per day for 63 days for alleged discrimination against the plaintiff. The trial resulted in judgment against the telephone company for $6300, and the judgment was affirmed by the Supreme Court of Arkansas. The Supreme Court of the United States on appeal said:

> "Of course, it is not open to us to revise the construction placed upon the statute by the state court, but it is open to us to determine WHETHER THE APPLICATION MADE OF THE STATUTE IN THIS INSTANCE was so arbitrary as to contravene the fundamental principles of justice which the constitutional guaranty of due process of law is intended to preserve. What, then, are the circumstances in the light of which this question must be determined?" (Capitalization ours).

The Supreme Court then reviewed the application of the statute to the facts of the particular case, and after reviewing the facts said in conclusion:

> "In these circumstances to inflict upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law. It follows that the ruling of the trial court, as sustained by the Supreme Court of the state, tended to deprive the defendant of a right

> secured by the 14th Amendment. The judgment of the lower court is reversed."

Our point is thus clear: that the court will apply the facts of the case before it in determining whether the penalty is arbitrary and oppressive when applied to the facts of that particular case. So applied it is seen that a court is justified in holding a penal statute, when applied to the facts of a particular case, may work a violation of the due process clause of the Constitution; while the same statute when applied to the facts of another case may not work a violation of the due process guaranty.

That such is the case also appears in the Supreme Court case of *Missouri R.R. Co. v. Tucker*, 230 US 340, 33 Sup. Ct. 961. In this case a statute of Kansas prescribed a schedule of minimum railroad rates for transportation of certain articles and provided that every such railroad carrier,

> "which shall demand, exact, or receive for such transportation or delivery any sum in excess of the rates hereby made lawful shall be liable to any person injured thereby in the sum of $500 as liquidated damages, to be recovered by action in any court of competent jurisdiction, together with a reasonable attorney's fee to be fixed by the court."

The railroad company defended upon the grounds that the statutory rates were confiscatory and void, and that the statute, and particularly the provision for

the recovery of $500 as liquidated damages, was so arbitrary and unreasonable as to be repugnant to the due process of law and equal protection clauses of the Constitution. The plaintiff recovered judgment for the $500, which was affirmed by the Supreme Court of the State, and the railroad company appealed to the U. S. Supreme Court. The Supreme Court reviewed the circumstances of the case before it, and said:

> "It is in the light of these considerations that the validity of the provision imposing a liability for liquidated damages in the sum of $500 for every charge in excess of the legislative rates must be tested.
>
> "It will be perceived that this liability is not proportioned to the actual damages. It is not as if double or treble damages were allowed, as often is done, and as we think properly could have been done here. Nor is it as if there would be difficulty in proving or ascertaining the actual damages, thereby furnishing a reason for prescribing a liquidated amount reasonably approximating the probable damages, taking one case with another. What the statute does is to authorize a recovery of $500 in every case . . . In the present case the shipment was of 25 barrels for a distance of 300 miles, and the excess over the legislative rate, $3.02, was less than 1/150th of the authorized recovery. . . .
>
> "As applied to cases like the present, the imposition of $500 liquidated damages, is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would be nothing short of the tak-

> ing of property without due process of law, and therefore in contravention of the 14th Amendment. Upon this ground the judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion."

See also *Chicago & NW RR Co. v. Nye Schneider Fowler Co.* 260 US 35, 43 Sup. Ct. 55 in which the Supreme Court said:

> "Such penalties or fees must be moderate and reasonably sufficient to accomplish their legitimate object and that the imposition of penalties or conditions that are plainly arbitrary and oppressive and 'violate the rudiments of fair play' insisted on in the 14th Amendment will be held to infringe it. In this scrutiny of the particular operation of a statute of this kind, we have sustained in it its application to one set of facts by the state court and held it invalid when applied to another . . . "

It seems clear then that when in any particular case the application of a penal statute, such as the statute relied upon by the plaintiff in this case, shocks the court's sense of fairness — when its application contravenes the established principles of justice—when it results in an unjust or excessive claim — when its application is oppressive and not fair play — when its application is arbitrary and not proportioned to any actual or legal damage or injury — when, as in this case, the plaintiff has wholly failed to show that he has been "aggrieved" in any particular, the court ought to hold such an application of the statute as to be nothing

short of the taking of property without due process of law.

$50.00 a day for 63 days,—$3,150.00 is the plaintiff's prayer for judgment against the defendant Wallis George personally,—as if the plaintiff was entitled to that sum as a reward for making a written request of the defendant to make and file an annual report for the Baranof Hotel Corporation,—all without even a pretense that he had been adversely or injuriously affected in any particular, or "aggrieved" in any manner. The bare statement of the claim itself, as shown in the plaintiff's amended complaint, ought to be sufficient to show that the defendant's demurrer is well taken.

We have herein stated that the penalty imposed by Section 923 is discriminatory. And so it is. The $50.00 a day penalty is exacted only of the president and treasurer of domestic corporations doing business in the Territory. Foreign corporations doing business in the Territory are required to file annual reports (C.L.A. Section 946, as amended by Chapter 89, Laws 1935). Section 945, as amended by Chapter 89, Laws 1935, provides that:

> "If any such corporation or company (foreign) shall attempt or commence to do business in the Territory without having first filed such statements and certificates it shall forfeit the sum of $25.00 for every day it shall so neglect to file the same . . . "

That penalty is forfeited by the corporation itself, and not by any officer or person; and the penalty is paid into the Territorial Treasury, and not to an aggrieved creditor or stockholder, as in the case of a domestic corporation; and it is the duty of the Attorney General of the Territory to sue for and recover the penalty in the name of the Territory.

While we make no claim of violation of the equal protection clause of the 14th Amendment, same being of questionable application to the Territory, we do claim that the discrimination and other inequitable facts shown are good grounds for holding that the facts of the case before the court do come within the meaning, and protection, of the due process clause of the 5th Amendment, which is unquestionably applicable in the Territory.

CONCLUSION

On the points and reasons stated, we believe the defendant's demurrer to the plaintiff's amended complaint, and the District Court's judgment of dismissal of plaintiff's action, ought to be affirmed.

Respectfully submitted,

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